Supreme Court, U. S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1971

No. 71-1273

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

IRVING FRIED,

Defendant-Appellant.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1971

No.

UNITED STATES OF AMERICA,

Respondent,

v.

IRVING FRIED,

Appellant.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petition of IRVING FRIED, the appellant above-named, respectfully shows:

Petitioner prays that a Writ of Certiorari issue to review a final judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled action on January 6, 1972, which unanimously affirmed the judgment of the United States District Court for the Eastern District of New York entered July 31, 1970 rendered after trial, without a jury,

ordering and adjudging that another named defendant in this action which has not taken any appeal, to wit, NEWBURGER, LOEB & CO., turn over to the respondent, UNITED STATES OF AMERICA, the stock brokerage account in their custody maintained in the name of appellant, said District Court having found and determined that said stock brokerage account represented the proceeds of transfers made by one SOLOMON FRIED against whom the respondent, UNITED STATES OF AMERICA, had recovered a judgment which then remained unsatisfied.

OPINIONS BELOW

No opinion was rendered by the United States Circuit Court of Appeals for the Second Circuit and its order of affirmance is unreported.

The opinion of Hon. ORRIN G. JUDD, Judge of the District Court for the Eastern District of New York, before whom the trial of this action, without a jury, was held is unreported, but a copy thereof is attached hereto.

JURISDICTION AND TIMELINESS

The jurisdiction of this Court is invoked pursuant to Title 28 U.S.C. 1257.

The final order and judgment of the United States Court of Appeals for the Second Circuit which is here sought to be brought up for review was rendered on January 6, 1972, and the within petition is made not more than ninety (90) days after such order and judgment.

SUMMARY STATEMENT OF MATTER INVOLVED

Respondent, UNITED STATES OF AMERICA, having recovered a judgment for income tax deficiencies in November, 1960 against SOLOMON FRIED, the father of appellant, which judgment remained unpaid, instituted the within action against appellant IRVING FRIED, an admittedly mentally and emotionally disturbed son of the judgment debtor who was not competent to testify and did not testify at the trial, for a determination that a stock brokerage account maintained by appellant with NEWBURGER, LOEB & CO. represented property transferred by the judgment debtor SOLOMON FRIED in fraud of creditors and should be paid over to respondent, UNITED STATES OF AMERICA, on its judgment.

SOLOMON FRIED, the judgment debtor and alleged transferor, was not named as a party defendant in this action, nor served with any process therein to give the trial court jurisdiction over him, and appellant therefore urges that the judgment entered herein which is sought to be reviewed was invalid for lack of jurisdiction and results in an unconstitutional deprivation of property of the judgment debtor without due process of law.

QUESTION PRESENTED

Was the Judgment entered herein void and invalid and violative of the United States Constitutional provisions in depriving a party of property without due process of law and the equal protection of the law since in this action against an alleged transferee of property from a transferor-judgment debtor the said transferor-judgment debtor was not named as a party in that action or served with process therein?

THE STATUTES INVOLVED

The Fifth and Fourteenth Amendments to the Constitution of the United States, Title 26 U.S.C. 6901 and Sections 5225 and 5227 of the New York State Civil Practice Law & Rules are involved herein.

MANNER IN WHICH THE QUESTION WAS RAISED IN THE COURTS BELOW

Appellant below, the petitioner herein, in his brief submitted and filed in the United States Circuit Court of Appeals for the Second Circuit urged that the judgment herein entered was void and invalid for lack of jurisdiction of the trial court and resulted in the deprivation of the judgment debtor's property without due process.

STATEMENT OF FACTS AND ARGUMENT

The government recovered and entered a judgment in the United States District Court for the Eastern District of New York in its favor and against SOLOMON FRIED, the father of the appellant, IRVING FRIED, for income tax deficiencies on November 21, 1960 in the sum of $191,032.99, and at the time of the commencement of the instant action there remained unpaid thereon the sum of $174,997.48, with interest.

Respondent alleged that prior to and subsequent to the entry of said judgment, the judgment debtor, SOLOMON FRIED had transferred and delivered to petitioner certain property and money, without fair consideration, thereby rendering said judgment debtor insolvent, or with the intent to defraud the respondent, as judgment creditor. The proceeds of such transfers were alleged to be in petitioner's stock brokerage account maintained by him with NEWBURGER, LOEB & CO., stockbrokers.

The action was commenced on August 11, 1967 and was instituted and concluded without any notice whatsoever to the judgment debtor SOLOMON FRIED.

Prior to the institution of the instant action, respondent had instituted various proceedings to effect the collection of the judgment, one of which was for the same relief, to wit, to recover the same stock brokerage account maintained by appellant on the ground that same was the property of SOLOMON FRIED, the judgment debtor. Such prior proceeding, on respondent's motion for judgment, came on to be heard by the District Court (Dooling, J.) and said motion was denied the District Court stating that although respondent had a suspicion that the brokerage account was the property of the judgment debtor, that the facts

> "do not suffice to support a finding that the account is SOLOMON FRIED's in whole or in any confidently measurable part * *."

Petitioner is approximately 43 years of age, is mentally disturbed and retarded and not employable. He presently draws disability pension from the Social Security Administration because of such disability. From 1951 to about mid-1965 he had worked as a "runner" for various brokerage firms.

During the trial, respondent stipulated that there was no direct evidence or information that it had that any transfer could be established by such evidence from the father to petitioner, or any direct evidence that any of the judgment-debtor's property or money went into petitioner's brokerage account.

The judgment debtor SOLOMON FRIED has appeared with respect to the tax liability herein at the U.S. Attorneys office in

Miami, Florida, where he resides, at the office of the Attorney General in Washington, D.C. He did not appear and testify in this action because of an outstanding order of arrest which the U.S. Attorney for the Eastern District of New York acknowledged he would have enforced if he had so appeared. Petitioner, as aforestated, did not testify because of his disability, and particularly in the light which the District Court stated that would be given to his testimony, a previous District Court judge having previously found and held same to be worthless.

In *Commissioner of Internal Revenue v. Stern*, 1958, 357 U.S. 39, this Court held that the existence and extent of liability of a transferee of property of a taxpayer in respect to income tax imposed under the transferee provision of law (Title 26 U.S.C. 6901) should be determined by state law. The Court acknowledged under its aforesaid holding that on the same set of facts, different results could be had in different states depending upon the applicable state law, that the Congress was aware of this situation when enacting legislation and chose not to enact a uniform law applicable nationwide.

The State of New York in enacting legislation concerning and relating to the liability of transferees of property of a judgment debtor has enacted Sections 5225 and 5227 of the New York Civil Practice Law and Rules, which state as follows:

"5225 Payment or delivery of property of the judgment debtor.

(b) Property not in possession of judgment debtor. Upon a special proceeding commenced by the judgment creditor, against a person in possession or custody of money or other property in which the judgment debtor has an interest, or against a person who is a transferee of money or other

personal property from the judgment debtor, where it is shown that the judgment debtor is entitled to the possession of such property or that the judgment creditor's rights are superior to those of the transferee, the court shall require such person to pay the money * * to the judgment creditor * *. Notice of the proceeding shall also be served in the same manner as a summons or by registered or certified mail, return receipt requested. The court may permit the judgment debtor to intervene in the proceeding. * *"

"5227 Payment of debts owed to judgment debtor
Upon a special proceeding commenced by the judgment creditor, against any person who it is shown is or will become indebted to the judgment debtor, the court may require such person to pay to the judgment creditor the debt upon maturity * * and to execute any document necessary to effect payment; or it may direct that a judgment be entered against such person in favor of the judgment creditor.* * Notice of the proceeding shall also be served upon the judgment debtor in the same manner as a summons or by registered or certified mail, return receipt requested. The court may permit the judgment debtor to intervene in the proceeding. * *"

Each of the foregoing sections provide for service of process or other notice deliniated upon the judgment debtor. It is undisputed that no such service or notice was made upon the judgment debtor in any manner whatsoever.

The courts of the State of New York have interpreted the above sections and in *Ruvolo v. Long Island R.R. Co.*, 1965, 45 Misc. 2d 136, the court stated:

"Under both sections (CPLR 5225 and 5227) notice of the proceeding must 'also be served upon the judgment debtor in

the same manner as a summons or by registered or certified mail, return receipt requested'."

and the court further held that proceedings under CPLR 5225 (b) and 5227 are plenary in that the court can adjudicate rights and interests in the debt or fund which is the subject matter of the proceeding.

Taag Designs v. Grant, 1965, 46 Misc. 2d 505, held that CPLR 5225 and 5227 are not available to a judgment creditor where the requisite notice to a judgment debtor had not been given, and that such defense may be raised by the third party.

Thus, the respondent herein attempted in the within action to enforce its rights as a judgment creditor against petitioner, as a third party, under the laws of the State of New York. The applicable sections of the New York State Law provide that to fix the liability of a transferee, the transferor must be given notice of the proceeding or the remedy is not available. Such notice was mandated so that the due process provisions of law, the equal protection guaranteed under the law and the deprivation of property without due process would not be violated. Respondent's failure in the instant action to give the judgment debtor the requisite notice was fatal to its action and the judgment entered herein which is sought to be reviewed was void and invalid.

WHEREFORE, Petitioner, IRVING FRIED, prays that a Writ of Certiorari may be issued out of and under the seal of this Court directed to the United States District Court for the Eastern District of New York, commanding that they certify and send to this Court on a date certain to be therein designated, a full and complete transcript and record and all proceedings of the said Court to the end that the case may be reviewed and determined in this Court as provided by Title 28

U.S.C. 1254; that the final order and judgment of the said Court and of the United States Court of Appeals for the Second Circuit may be reviewed and corrected by this Court in conformity with the Constitution of the United States, and that said final order and judgment may be reversed and the complaint herein dismissed and appellant prays for such other and further relief as may be just and proper.

Dated: New York, New York
1972

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Appendix A

MEMORANDUM OF DECISION, JUDD J.
DATED JUNE 23, 1970

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,
Plaintiff,

-against-

IRVING FRIED and NEWBURGER, LOEB & CO.,
Defendants.

Appearances:

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United States Attorney
Attorney for Plaintiff

By: CYRIL HYMAN, ESQ.
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By: IRVIN HUSIN, ESQ.
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OSMOND K. FRAENKEL, ESQ.
Attorney for Defendant Newburger,
Loeb & Co.

JUDD, J.

Appendix A

MEMORANDUM OF DECISION

This case, tried to the court without a jury, is the latest chapter in the efforts of the government to collect federal income taxes which Solomon Fried, a dentist, evaded by filing returns for the years 1944 through 1949. Various phases of the matter have been before at least six other judges of this court and several panels of the Court of Appeals.

The complaint asserts that a stock brokerage account of defendant Irving Fried maintained by defendant Newburger, Loeb & Co. represents the proceeds of transfers made by Solomon Fried without consideration and in fraud of plaintiff as a judgment creditor. Irving Fried is a son of Solomon Fried.

The controlling question in this case is whether the government has sustained its burden of proving that moneys of Solomon Fried were transferred to Irving Fried's account. It is clear that Solomon Fried had substantial assets after the United States claim against him arose, and that moneys not belonging to Irving Fried went into his brokerage accounts. The facts presented to the court are less than complete because of three circumstances: the mental and emotional problems of defendant Irving Fried which disabled him from testifying, the inability of any party to obtain Solomon Fried's appearance in court to give evidence, and the absence of some of Irving Fried's records.

The first step in evaluating the circumstantial evidence in the case and the inferences on which the government relies, is to set forth a chronological story of the income tax assessments and the government's efforts to collect them.

Appendix A

The History of Solomon Fried's Tax Liabilities

During the six years, 1944 to 1949, inclusive, Solomon Fried underpaid his income taxes by approximately $117,000. On December 4, 1951, the Internal Revenue Service issued assessments totaling $263,174.69 for the amount of these tax deficiencies, together with penalties added under Sections 293(b) and 294(d)(2) of the Internal Revenue Code of 1939, and interest to date. Dr. Fried filed a petition for review in the United States Tax Court.

A tax lien was served on New York Life Insurance Company on December 6, 1951. That company had issued eight policies on Dr. Fried's life, some of which contained provisions for payments during disability.

Dr. Fried liquidated securities during the period from December 19, 1951 to June 30, 1952 through two stock brokers, one in Florida and one in New York, and through a Brooklyn firm called Security Adjustment Corporation. The proceeds, aggregating $271,850.71, were delivered to him. No evidence is available concerning Dr. Fried's disposition of any of this money. When brought before Chief Judge Inch by an IRS agent in August, 1953, he said he did not have the money, but that denial is not conclusive on the government.

Criminal indictments against Dr. Fried for filing false returns were disposed of by his pleading *nolo contendere.* After making a payment of $25,000 to show his good faith, he was sentenced on September 14, 1953 to pay fines of $1,000 for each of the years 1945, 1948 and 1949. The fines were paid.

An account in the name of Irving Fried was opened with Ira Haupt & Co. either in 1950 or 1951 (the dates set forth over

Irving Fried's signature in his answers to an information subpoena) or in 1953 (the first date for which statements have been put in evidence).

Dr. Fried filed a claim for disability payments under his New York Life Insurance policies in about November, 1953.

When the Tax Court case was called for trial on January 17, 1955, Dr. Fried's counsel moved that the case be discontinued and stated that he intended to abandon all contentions raised by the petition.

The Suit Against Solomon Fried

Suit against Dr. Fried and New York Life Insurance Company was filed in this court by the United States on March 1, 1955 (Civil No. 15,371), seeking to foreclose the United States' lien on his life insurance policies.

In an earlier action by Dr. Fried against New York Life Insurance Co., Chief Judge Inch had ruled that disability payments under the policies were exempt from the government income tax lien, because of provisions of the New York Insurance Law. The suit was begun in the state court, the United States was joined as a party at the instance of New York Life, and the suit was then removed to the United States District Court. The United States Court of Appeals ruled in 1957, in the removed case, that the New York statute was ineffective against the federal tax lien and that judgment should be entered for the United States. *Fried v. New York Life Insurance Co.*, 241 F.2d 504.

Chief Judge Bruchhausen issued a memorandum in Civil No. 15,371 in April, 1960 directing that Ilene Fried, Dr. Fried's wife, be added as a defendant, to determine her rights as

beneficiary of the policies. Thereafter, he granted the government's motion for summary judgment; and signed a judgment on November 21, 1960 finding that Dr. Fried was liable to the government in the amount of $191,032.99, directing New York Life Insurance Company to pay to the United States the disability benefits on five policies and the cash surrender values of the other three policies. An appeal was taken to the United States Court of Appeals, Mrs. Fried claiming that she paid the premiums and the policies belonged to her. The judgment was affirmed on November 20, 1962. *United States v. Fried,* 309 F.2d 851.

Meanwhile, New York Life had ceased making disability payments, for want of proof of continuance of the disability. Solomon Fried had refused to submit to examination unless the government agreed to pay half the disability payments to him. On Application by the government, Judge Dooling ruled that Dr. Fried must state his whereabouts and also submit to examination by a company doctor, as part of his substantive duty to the United States as a judgment creditor. An order dated April 24, 1964 directed Dr. Fried to appear in the courthouse for a deposition concerning his whereabouts and his examinations by physicians since 1960, and to submit to a physical examination by a doctor designated by New York Life. A notice of appeal was filed. The appeal was settled by a stipulation of counsel providing for the insurance company to pay the United States a sum in excess of the cash surrender value, in full settlement of the policies.

Subpoenas to examine Albert Fried, Carol Fried and Martin Feldman, a son, daughter and son-in-law, respectively, of Dr. Fried, were issued in May, 1965. By order of Judge Dooling dated June 1, 1965, Carol Fried and Martin Feldman were directed to appear for examination, decision on Albert Fried's appearance being reserved.

A subpoena to Solomon Fried was issued in July, 1965, by mailing a copy to his last known address in Brooklyn and affixing a copy to the door of the building. Pursuant to an order to show cause signed by Judge Rayfield on August 16, 1965, Solomon Fried was directed to appear on a motion to adjudge him in contempt for non-compliance with the subpoena. Judge Bruchhausen found him guilty of contempt and by order of November 18, 1965 directed that, unless he purged himself by appearing for examination within ten days, plaintiff might have the marshal bring him before a judge to answer the contempt charge. A notice of appeal was filed, but the appeal was dismissed for lack of appellate jurisdiction on May 5, 1966.

An order for Ilene Fried to appear for examination was signed by Judge Mishler on October 4, 1965. He subsequently appointed a doctor to examine her, and received a report that she had hypertensive and arteriosclerotic heart disease, and that the emotional excitement of being questioned might lead to a fresh coronary thrombosis.

A subpoena to Irving Fried to appear for examination was met in November, 1965 by a motion to quash, supported by a letter from Dr. Jerome S. Fass, a psychiatrist who had treated him since February, 1961. He stated that his diagnosis was "schizophrenic reaction, paranoid type, associated with mild retardation," and that Irving Fried's appearance as a witness "could have a most disastrous effect upon him and could cause a complete mental collapse requiring institutionalization." Judge Bruchhausen nevertheless signed an order on November 29, 1965 to arrest him and bring him before the court to answer the charge of contempt. An appeal from this order was dismissed for lack of appellate jurisdiction in May, 1966.

A report in January, 1966 from a psychiatrist appointed by the United States confirmed the diagnosis of schizophrenic

reaction with paranoid ideation, but stated that "his evasiveness was specifically related to his attachment to his father and not to any true memory loss or retention difficulty in that sense." This doctor stated only that legal interrogation of the defendant "may very well worsen his psychiatric picture." In view of Irving Fried's lack of mental capacity, Judge Mishler stated that "His affidavit claiming title to the account is worthless."

Meanwhile, on January 4, 1966, Irving Fried withdrew securities worth $30,600 from his account, then at Newburger, Loeb & Co.

In Support of a motion to vacate the restraining order which had been issued against Newburger, Loeb & Co., Solomon Fried signed an affidavit in New Jersey on March 11, 1966, asserting that he had no interest in any of Irving's property or in any securities held for him by Rafkind & Co. Judge Mishler on May 4, 1966 directed the government to commence a special proceeding under N.Y. CPLR §§ 5225 and 5227 to determine the ownership of the account, and denied the motion to vacate, without prejudice to renewal if such a proceeding was not diligently prosecuted.

Irving Fried's answer to the information subpoena was filed on May 12, 1966, with an affidavit from his counsel stating that the answers had been prepared by counsel in his own language after reviewing the records and talking with Irving Fried, who suffered from mental and emotional disturbances and "became hysterical at times at the thought that everything he had worked for and saved was being attacked."

An application for psychiatric examination of Albert Fried, to determine his capacity to testify, was denied by Judge Rosling on June 8, 1966, without prejudice to later renewal in aid of proceedings supplementary to judgment.

Subsequently, Judge Dooling later ruled in a written memorandum that there was no reason why Albert Fried could not answer interrogatories, and fixed a date of August 1, 1967 for him to answer the questions annexed to an information subpoena.

On the denial of a subsequent motion for reargument, Albert Fried appealed to the Court of Appeals, which dismissed the appeal for want of appellate jurisdiction. *United States v. Fried*, 386 F.2d 691.

The government moved on affidavits to require Newburger, Loeb and Rafkind & Co. to turn over assets in the Irving Fried account, on the ground that they constituted property in which Solomon Fried had an interest. In an opinion by Judge Dooling, such summary relief was denied, without prejudice to renewal on the basis of additional evidence.

In a separate order dated December 29, 1966, Judge Dooling found Irving Fried to be in contempt for not answering a supplemental information subpoena, subject to the right to purge himself by answering it fully within forty days. The answer to the information subpoena was filed on January 12, 1967.

Albert Fried appeared before Judge Dooling on February 21, 1967 with his counsel, prior to the return date of a motion to punish him for contempt. Before adjourning the hearing, Judge Dooling stated:

> "THE COURT: Now, anytime Mr. Solomon Fried wants to pay the judgment against him he can relieve the ailing members of his family of a great deal of pressure. Anytime any of these people wants to make complete, frank and open disclosure of all relevant facts, all pressure will at once

disappear.

"The calculated and it at times seems organized effort to frustrate disclosure hardly produces the impression that these accounts genuinely belong to the people in whose name they stand, or that Mr. Solomon Fried isn't the moving spirit behind this whole set of operations, for if the facts were as the papers suggest and attempt to say on the parts of these various third parties and so forth and so on, the obvious, the manifest, the plain, the inevitable course, would be complete, open, easy disclosure, demonstrating to the Government the error of its suggestions.

"The fact that the course taken by everyone who has touched any aspect of the case on the side of Solomon Fried and the members of his family has been exactly the opposite, has at all times been addressed exclusively to the prevention of disclosure and the frustration of disclosure is most eloquent evidence that the Government's suspicions of impropriety have a foundation and that their task is simply to locate the foundation, and that is the task on which they are embarked."

Prior Steps in this Action

The present action by the United States against Irving Fried and Newburger, Loeb & Co. was begun by filing a complaint on August 11, 1967, before the termination of the restraining orders which had been issued in Civil No. 15,371. Judge Mishler signed a temporary restraining order on August 11, and any withdrawal of money or securities from the account, except to pay income taxes, has been enjoined, pending final determination of the action.

A motion by the defendant for summary judgment was

denied by me with a Memorandum on November 3, 1969. The Memorandum pointed out that the issue in this case, whether the brokerage account includes proceeds of transfers made in fraud of creditors, is different from the issues in the proceeding before Judge Dooling, where it was contended that Solomon Fried, the judgment debtor, had an actual interest in the account; and that there were triable issues of fact.

Irving Fried

Irving Fried's sister, Dolores Feldman under subpoena by the government, testified that her brother was born mentally defective, that he was always retarded, and that his mental and emotional condition had gone downhill in the last fifteen years. He had always resided with his parents and had always been supported by his father. She did not know of any other member of the family giving him any substantial sums. An effort to teach Irving to be a dental mechanic did not work out. He is now 42 years old.

He was employed as a runner from time to time until mid-1965 by various firms where he had accounts or where his broker recommended him for employment.

Defendant's answers to the information subpoena assert that he always lived with his parents or with one of his brothers, that he never paid any rent, that he never made any contribution toward the cost of food or other expenses of his homes, that he wore the cast-off clothes of his brother Albert and his brother-in-law Dr. Martin Feldman, and that every cent of his earnings went into the brokerage accounts.

These assertions are inconsistent with his income tax returns, which show deductions each year (except 1966 and 1967) for charitable contributions and each year for sales taxes, and for

periodicals, telephone calls, stationery and postage in connection with stock investments, as well as fees in most years for preparation of income tax returns, and state income tax payments in some years. His charitable contributions were modest, ranging from $46.00 in 1958 to $125.00 in 1959, and averaging about $90.00. His investment expenses averaged $115.00 per year. More important, the inference from his sales tax deductions, which averaged about $51.00 per year, is that he must have spent at least $1,000 per year on cigarettes, restaurant meals, and taxable merchandise.*

His travel expenses going back and forth to Florida were paid by his parents. No evidence was offered by either party concerning the source of the funds in excess of his earnings that concededly went into his brokerage accounts.

The accountant who had prepared Irving Fried's income tax returns from 1950, testified that he obtained the information from Solomon Fried and from stock records, because Irving Fried "was not capable of discussing it with me." The accountant did not have copies of the income tax returns prior to that for 1957.

Irving Fried's Brokerage Accounts

Irving Fried maintained accounts with Ira Haupt & Co. from 1953 (or earlier) to 1962, with Joseph Faroll & Co. from 1957 to 1963, and with Newburger, Loeb & Co. from 1963 to 1965. The later Newburger, Loeb forms stated, "by arrangement with Rafkind & Co., Inc." He also had accounts at various times with A.L. Stamm & Co. and with Schweikart & Co. From an early date, the accounts were handled by George F. Rafkind, who had been successively with Faroll & Co., Schweikart & Co.,

*The sales tax in New York City did not exceed 5% until 1969.

Newburger, Loeb & Co. These were margin accounts, on which Mr. Rafkind made money for his customer. Later on, Albert Fried and Morton Fried, other sons of Solomon Fried, also opened accounts which Mr. Rafkind handled. Although Mr. Rafkind attempted to persuade the court that orders on the accounts were given by Irving, he admitted that matters on the accounts were discussed primarily with Solomon Fried because Irving was "not 100 per cent," and "you could see by looking at him that he was sick."

Net cash deposits in Irving Fried's accounts totalled at least $36,590.16, during a period when his wages as reported by the Social Security Administration totalled $19,951.67. He also placed in his accounts 200 shares of Hupp stock and 100 shares of Graham Paige, whose source was not ascertainable. In some years, his cash deposits in the stock account were several times the amount of his salary.

Re-invested earnings, realized capital gains, and unrealized capital appreciation helped to build up the accounts.

Irving Field's withdrawals from the accounts totalled over $40,000, including $2,254 in cash and $37,792 in stock. At May 4, 1966, after these withdrawals, the value of stock and cash in his Newburger, Loeb account was $63,946.

Defendant's counsel assert that some of the moneys deposited in his accounts came not only from his 1951-65 earnings, but also from his pre-1951 earnings, which amounted to $6,370.66. However, there is no evidence that he had saved any substantial amount of these early earnings. As against the claim that he had several thousand dollars of E-bonds which had been given to him, the records of the Public Debt Bureau show only five bonds, issued in 1944-45 and cashed in for $252.50 in September, 1953. He had a bank account in East River Savings

Bank, opened in February, 1950 and built up to $605.33 by the end of 1950. It was closed out in February, 1951. He had an account in Seamen's Bank for Savings, which had a balance of $265.46 at the end of 1950. The maximum balance was $1,839 at September, 1952. Substantially all of this account was used during 1952 and 1953 to meet margin calls.

His only other income available for payment into the brokerage accounts was unemployment insurance payments of $331.50 received during 1963.

Solomon Fried

Although there has been an arrest order against Solomon Fried since November, 1965, directing that he be brought into court to answer the charges of contempt, he came to New York in 1967, 1968 and 1969 to discuss Irving Fried's income tax returns with his accountant, and he was in New York in January, 1970 on the occasion of his brother's death.

Defendant's only witnesses were one of his attorneys, and the government attorney. Defendant's attorney testified that Solomon Fried had told him in Florida in the fall of 1969 that he would like to testify on the source of funds, but would not come until some arrangement was made to expunge the contempt which had brought about the outstanding order of arrest. Counsel had not asked Irving Fried or Ilene Fried to testify, nor made any attempt to take Solomon Fried's deposition in Florida. He did not know where to reach Dr. Fried, except through his Florida attorney. The Assistant United States Attorney, called by the defense, admitted that he would have had the United States Marshal arrest Solomon Fried and bring him before the court on the contempt charge if he had known of his presence in New York.

In Irving Fried's answer to the supplemental information subpoena, he listed eight different hotels, motels, and apartments in Florida, New Jersey, and Ohio where he and his father had lived during 1966. Solomon Fried and Irving always visit Irving's broker during the broker's winter visits to Florida, but the broker has never been to their hotel or home.

After the trial, defendant's counsel sought to reopen the case to take the deposition of Solomon Fried in Florida, reciting that Solomon Fried would deny having made any transfers to or for the benefit of the defendant, but would plead the privilege against self-incrimination if any other questions were put to him. The motion was denied by the court as untimely and insubstantial.

Transfers from Solomon Fried to Irving Fried's Accounts

On the basis of the record and exhibits and the facts outlined above, the court makes the following findings.

Not more than $7,200 of the moneys and securities deposited in Irving Fried's accounts represented his earnings or savings, or gifts or loans from persons other than Solomon Fried. (See Appendix). This represents less than 20% of the total amount that went into the account.

All other moneys and securities placed in Irving Fried's brokerage accounts represented transfers from his father Solomon Fried.

The absence of certain brokerage records involves no prejudice to the defendant, since the records could not increase the amount available for him to put into the accounts, they might, on the contrary, show additional deposits for which

there could be no other source except his father.

During five of the years involved (1957, 1958, 1959, 1961, and 1965), Irving Fried's total earnings were only $1,904, and cash deductions on his income tax returns were $1,547. During those years he withdrew no cash and only $2,125 in stock. He would have had to withdraw more than the total he had deposited in his accounts, if his father had not provided his support.

Irving Fried's withdrawals from his brokerage accounts represent almost 40% of the total amount of the accounts, including their full value at the date of his response to the information subpoena,* and left nothing in the accounts which was attributable to any deposits he may have made.

Comparison of Irving Fried's gross earnings with the federal minimum wage standards, based on a forty hour week for fifty-two weeks, shows that his earnings exceeded the minimum wage in only five years (1951-55) during the entire sixteen-year period covered by his accounts, and by a total of only $1,164 for those five years. Unless he had been supported by his father, he would not have been able to deposit more than $1,000 in all in his brokerage accounts.

Any payments by Solomon Fried for the support of Irving Fried constituted indirect transfers into Irving Fried's brokerage account.

In the absence of contrary proof, the court finds that

Solomon Fried was insolvent at the time of each direct or indirect transfer.

The transfers from Solomon Fried to Irving Fried's brokerage accounts were made with actual intent to hinder, delay and defraud the United States of America as a creditor.

Therefore, the court finds that the entire brokerage account now held by Newburger, Loeb & Co. represents property transferred by Solomon Fried in fraud of creditors and should be transferred and paid over to the United States of America.

The Applicable Statute

During the entire period involved, the New York Debtor and Creditor Law has treated transfers as fraudulent as to creditors if made without fair consideration either while insolvent or with actual intent to hinder or defraud creditors:

"§ 273. Conveyances by insolvent

"Every conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made or the obligation is incurred without a fair consideration. Added L. 1925, c.254, § 1, eff. April 1, 1925.

"§ 276. Conveyance made with intent to defraud

"Every conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors. Added L.1925, c.254, § 1, eff.April 1, 1925."

Since September 1, 1963, the statute has also specified that any transfer made without fair consideration by a person against whom a judgment has been docketed is fraudulent as to that person if the judgment is not satisfied. Debtor and Creditor Law § 273-a. Every creditor may have a fraudulent conveyance set aside to the extent necessary to satisfy his claim. Debtor and Creditor Law § 278.

Proof Required to Set Aside Fraudulent Transfers

Admittedly, the plaintiff has the burden of proof throughout a suit to set aside a fraudulent transfer. *United States v. Kaplan,* 267 F.2d 114 (2d Cir. 1959).

On the other hand, it is not necessary to show that the judgment debtor has legal title to the property which the judgment creditor seeks to reach. *Meth v. Greenspan,* 169 Misc. 378, 7 N.Y.S.2d 273 (Sup.Ct, Kings Co., 1938).

Moreover, it is not necessary that the transfer of property be proved by direct evidence. In *Menick v. Goldy,* 280 P.2d 844 (Cal.App. 1055), the court found that a Cadillac bought for cash by a seventeen year old girl represented a transfer from her bankrupt father, even though the uncontradicted testimony of the girl and her grandmother was that it came from a hoard which her grandmother had secreted. The court stated (p. 848):

> "The real intent of the parties and the facts of a fraudulent transaction are peculiarly within the knowledge of those sought to be charged with fraud. Direct proof of a transfer and of a fraudulent intent is often an impossibility. Hence, proof indicative of a transfer and of fraud may come by inference from circumstances surrounding the transaction, the relationship and interest of the parties. Taylor v.

Osborne-Fitzpatrick Finance Co., 57 Cal. App. 2d 656, 661, 135 P.2d 598; Burns v. Radoicich, 77 Cal.App.2d 697, 702, 176 P.2d 77."

It is true that Judge Dooling found in 1967 that the United States had not proved that the proceeds of Solomon Fried's sales of securities went into Irving Fried's accounts. But that decision was made on affidavits, on a motion for summary judgment. In this case, seven live witnesses testified, and the government introduced over 30 exhibits. The income tax returns, which disclosed defendant's personal expenditures, were not before Judge Dooling. His decision was not intended to restrict the findings that a court might reach after a full evidentiary trial such as has taken place here.

The government case is bolstered by two inferences. The first inference is that Dr. Solomon Fried remained in possession of the funds which he realized from the liquidation of securities in 1951-52. This is the familiar rule of the continuance of a known state of facts. Wigmore, *Evidence* (2d ed. 1940) § § 190, subd. 4(3), 382. In March, 1966, Dr. Fried's New York attorney wrote the United States Attorney that his client had "several thousand dollars worth of securities" and might be able to borrow to effect a compromise. The second inference is that the unexplained deposits to Irving Fried's account came from his father's cash. This is a rational inference, legally supported not only by the *Goldy* case, *supra,* involving transfers by a bankrupt, but by the application of a similar rule in other cases. Even in a criminal case, for instance, the acquisition of unexplained cash by a person who was in the vicinity of a robbed bank will support an inference that he stole the money from the bank. *Hansbrough v. United States,* 156 F.2d 327, 329 (8th Cir. 1946); *Crawley v. United States,* 268 F.2d 808, 810 (4th Cir. 1959); *United States v. Jackson,* 403 F.2d 647, 649 (3d Cir. 1968). Basing one inference on another inference is

proper. *United States v. Eustace,* 423 F.2d 569 (2d Cir. 1970).

The accountant who drew the income tax returns stated that in setting forth the various sales tax deductions which Irving Fried took, he assumed "the normal amount of sales tax," based on information from Solomon Fried that they spent a certain amount. Irving Fried was in the accountant's office when his father explained the items to go into the tax returns. There is no basis for defendant to challenge the court's conclusion that he made the personal expenditures which are indicated by his sales tax deductions.

Necessarily, the evidence of transfers by Dr. Fried is circumstantial. It is familiar law that circumstantial evidence is sufficient to prove any fact. *United States v. Dibrizzi,* 393 F.2d 642, 644-45 (2d Cir. 1968); *Auto Transport, Inc. v. Potter,* 197 F.2d 907, 910 (9th Cir. 1952). A pertinent example of this rule is *Henry v. Field,* 205 F.Supp. 197 (S.D.N.Y. 1962), where Judge Weinfeld found that transfers by a wife to her husband were made without restrictions, in spite of uncontradicted testimony by both the wife and her husband that he was intended only to hold them in trust and manage them for her.

The rule was applied to fraudulent transfers in *Altman v. Finkel,* 268 App.Div. 666, 52 N.Y.S.2d 634, 635 (1st Dept. 1945), where the court said:

> "Actual intent to defraud, or fraud in fact, like any other fact, may be shown by circumstantial evidence."

Even without actual intent to defraud, transfers from Solomon Fried to his son's account create a presumption that he was insolvent when he made them. Two cases in this Circuit are directly in point. *In Feist v. Druckerman,* 70 F.2d 333, 334-35 (2d Cir. 1934), Judge Augustus N. Hand stated:

"Now, there is a rule of long standing in the New York courts that a *voluntary* conveyance made when the grantor is indebted is presumptively fraudulent * * *

* * * * * * *

"* * * there was no proof offered to show the solvency of Max Druckerman at the time of the conveyance, so the trustee must win."

In *Wilson v. Robinson*, 83 F.2d 397, 398 (2d Cir. 1936), the court stated:

"Where a voluntary transfer is made when debts of the grantor are outstanding, the burden of going forward with proof of solvency is upon the transferee."

Indirect Transfers by Solomon Fried

An alternative theory supports the finding that Irving Fried's accounts were built up with transfers from his father. Using Irving's money for purchase of securities, while his father paid for his support, represents an indirect transfer from the father to the security accounts. It is no different from Irving supporting himself from his earnings, and his father transferring funds into the son's account.

This is not a new cause of action, as defendant asserts. The theory was made known at the beginning of the trial. Defendant has not pointed to any facts which he could have advanced if he had been confronted with the theory at an earlier date. In any event, the government is entitled to the benefit of any legal conclusions which can be drawn from the facts that were proved. *Deering v. Williams*, 378 F.2d 417, 419 (9th Cir. 1967);

Hamill v. Maryland Cas. Co., 209 F.2d 338, 340 (10th Cir. 1954).

It cannot be argued that Solomon Fried was fulfilling any legal or moral responsibility in supporting Irving Fried, since the earnings of a child are an offset to the parent's obligation of support, even while the child is under age. *Graffeo v. Graffeo*, 7 A.D. 2d 741, 180 N.Y.S.2d 844 (2d Dept. 1958). If he were fulfilling a duty to support his son, Solomon Fried would be entitled to receive the son's earnings. *Howard v. United States*, 2 F.2d 170, 176 (E.D. Ky 1924).

The court had not relied on any adverse inference from the absence of testimony by Irving Fried or his father. Such an inference can be drawn only if it is within the power of the party to require the presence of the witness. 1 Wigmore, *Evidence* § 286; *Dow Chemical Co. v. S.S. Giovanella D'Amica*, 297 F.Supp. 699 (S.D.N.Y. 1969). Irving Fried is not responsible for his own incapacity, which has been amply shown. Nor is he chargeable with his father's reluctance to come within the jurisdiction of this court. Nevertheless, the court may consider the close relations between the defendant and his father and the father's practice of eluding discovery, as having some bearing on the reasonableness of the inference that the unexplained deposits in Irving's brokerage accounts represented transfers from his father.

The United States of America is entitled to a judgment against defendants Newburger, Loeb & Co. and Irving Fried for the relief prayed in the complaint, with costs against defendant Irving Fried.

Settle judgment on notice.

ORRIN G. JUDD
U.S.D.J.

APPENDIX

Deposits allocable to Irving Fried's earnings from outside loans and gifts, and prior savings:

Account in East River Savings Bank, balance at December 31, 1950 $605.

Account at Seamen's Bank for Savings, balance at December, 1950 265.

Proceeds of E-bonds, cashed in 1953 252.

1951-56 – Average earnings, per Social Security records, $1,698 per year.

Deducting average expenditures for charities, sales taxes and stock investment periodicals (about $250), indicated taxable purchases ($1,000), based on figures for years covered by tax returns, and Social Security withholdings at 1½% per year through 1953 and 2% per year thereafter; and assuming that interest on margin accounts in excess of dividends results in refund of all withholding taxes, there would remain a maximum of $464 to $473 per year available for investment, or a total for six years of 2,540.

Note: On the basis of federal minimum wage tables, a total of $1,560 per year was required for living expenses during 1951-55 and $2,080 during 1956, which would indicate a smaller amount available to invest.

1957 and 1958 – No earnings.

1959 – Total earnings, $417, and deductions for charities, sales tax, stock investment data, etc., $379.50. Nothing

available for investment.

1960 – Total earnings $1,404.

Deducting $200 expended for charities, sales tax, and stock investment data, $1,000 indicated taxable purchases, and $42 Social Security tax, the maximum balance available for investment was $162.

1961 – Total earnings, $585.

After similar deductions of $250, and allowance for indicated taxable purchases, nothing was available for investment.

1962 – Total earnings, $2,156.

Deducting amounts expended for charities ($50), sales tax ($45), and stock periodicals ($75), and $900 for indicated taxable purchases, $112 for taxes withheld and not refunded in the next year, and $65 for Social Security taxes, the maximum balance available for investment was 909.

Loan from Morton Fried, not repaid 425.

1963 – Total earnings, $1,775.

Unemployment insurance, $357.

Deducting amounts expended for charities ($100), sales and cigarette taxes ($81), stock periodicals and income tax preparation ($100), $1,600 for indicated taxable purchases, and $62 for Social Security taxes, nothing was available for investment.

Loan from Dorothy Rafkind, not repaid $800.

1964 – Total earnings $2,527.

Deducting amounts expended for charities ($50), sales tax ($50), stock periodicals and income tax preparation ($100), and $1,000 for indicated taxable purchases, and $88 for Social Security taxes, the maximum available for investment was 1,239.

1965 – Total earnings, $902.

Deducting $208 expended for charities, sales tax ($30), stock purchases and income tax preparation, $600 for indicated taxable purchases, and $44 for tax withholdings which were not refunded in 1966, nothing was available for investment.

1966 – No earnings.

Total possible investment by Irving Fried.

$7,197.

APPENDIX B
Judgment Appealed From, dated July 31, 1970

(Same Title)

This cause having regularly come on for trial on January 19, 1970 and February 5, 1970, before the Court sitting without a jury, EDWARD R. NEAHER, United States Attorney for the Eastern District of New York, by CYRIL HYMAN, Assistant United States Attorney, of counsel, appearing for plaintiff, HUSIN, MILLER & LEVY, Esqs., by C. JOSEPH HALLINAN, Esq., of counsel, appearing for the defendant IRVING FRIED, and OSMOND K. FRAENKEL, Esq., appearing for the defendant NEWBURGER, LOEB & CO.; and the trial having been concluded and the cause having been duly submitted to the Court for its consideration and decision, and the Court having heretofore rendered on June 23, 1970 its decision embracing findings of fact and conclusions of law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure; and the Court having decided that the plaintiff UNITED STATES OF AMERICA is entitled to judgment against the defendants IRVING FRIED and NEWBURGER, LOEB & CO. to deliver all proceeds, monies and properties in the amount or value sufficient to pay the judgment of the UNITED STATES OF AMERICA against SOLOMON FRIED, which property is presently in their custody with respect to the stakeholder account maintained in the name of IRVING FRIED,

NOW, on motion of CYRIL HYMAN, Assistant United States Attorney, of counsel to EDWARD R. NEAHER, United States Attorney for the Eastern District of New York, attorney for the plaintiff, it is

ORDERED AND ADJUDGED that the defendant NEWBURGER, LOEB & CO. turn over to the plaintiff UNITED

STATES OF AMERICA the stock brokerage account in their custody maintained in the name of IRVING FRIED, and it is further

ORDERED that the Clerk of this Court shall enter this judgment.

Dated: Brooklyn, New York,
July 31, 1970
s/ Orrin J. Judd
United States District Judge

APPENDIX C
Order of United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixth day of January one thousand nine hundred and seventy-two.

Present:

HON. HENRY J. FRIENDLY
Chief Judge

HON. LEONARD P. MOORE

HON. JAMES L. OAKES

Circuit Judges.

United States of America,
Plaintiff-Appellee,

v.

Irving Fried and Newburger Loeb & Co.,
Defendants,

Irving Fried,
Defendant-Appellant.

Appendix C

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed with costs to be taxed against the appellant.

A. DANIEL FUSARO
Clerk

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FILED
MAY 26 1972
MICHAEL RODAK, JR., CLERK

No. 71-1273

In the Supreme Court of the United States

OCTOBER TERM, 1971

IRVING FRIED, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1971

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IRVING FRIED, PETITIONER

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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1. Petitioner's father, Dr. Solomon Fried, underpaid his income taxes for the years 1944 through 1949. After extended litigation (see Pet. App. A, 12-14), judgment against Dr. Fried was entered for the government in 1960 in the amount of $191,032.99, representing the unpaid tax liabilities together with penalties and interest. The judgment was affirmed on appeal. *United States* v. *Fried*, 309 F. 2d 851 (C.A. 2). This judgment was partially recovered by foreclosure of a lien on certain insurance policies owned by Dr. Fried (Pet. App. A, 14). Further attempts by the government to reach other assets of Dr. Fried were unsuccessful (Pet. App. A, 14-18).

Thereafter, on August 11, 1967, the government instituted the present action against petitioner and the brokerage firm of Newburger, Loeb & Company, where petitioner maintained an account. The government's complaint sought delivery of the account assets, alleging that $174,997.48 and interest remained unpaid on its judgment against petitioner's father and that petitioner's brokerage account represented the proceeds of a fraudulent transfer to petitioner from his father (R. 6-7).[1] Withdrawals from the account were enjoined pending the outcome of the action (Pet. App. A, 18).

At trial, the government presented ample evidence to establish that the entire amount in petitioner's account represented direct and indirect transfers fraudulently made by his father at a time when Dr. Fried owed the United States substantial amounts on account of taxes, penalties and interest and was presumptively insolvent (Pet. App. A, 23-25, 26-30). The district court entered judgment against petitioner and ordered the brokerage account turned over to the government (Pet. App. B, 34-35). The court of appeals affirmed without opinion (Pet. App. C, 36-37).

2. Petitioner contends (Pet. 4-8) that the decision of the district court is invalid for failure to serve petitioner's father, the judgment debtor. However, New York law, which, as petitioner correctly notes (Pet. 6), is controlling, does not require service of

[1] "R." refers to the appendix in the court of appeals.

the judgment debtor where, as here, the judgment creditor seeks to recover assets which are no longer owned by the judgment debtor but rather have been fraudulently transferred by him to a third party. *Kineon* v. *Bonsall*, 194 App. Div. 110, 185 N.Y.S. 694, affirmed, 232 N.Y. 624, 134 N.E. 598.[2] Cf. *Buffington* v. *Harvey*, 95 U.S. 99, 103. Accordingly, failure to serve petitioner's father did not deprive the district court of jurisdiction to render judgment in this action.[3]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

MAY 1972.

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[2] The decisions of inferior New York courts cited by petitioner (Pet. 7-8) are not to the contrary; they involved only actions to recover assets owned by or debts owed to the judgment debtor. In contrast, Dr. Fried, the judgment debtor here, signed an affidavit disclaiming any interest in petitioner's accounts (Pet. App. A, 16).

[3] Petitioner also suggests (Pet. 3) that the failure to serve Dr. Fried "results in an unconstitutional deprivation of property of the judgment debtor without due process of law." Assuming arguendo that petitioner has standing to make this argument, it is nevertheless forclosed by Dr. Fried's disclaimer of ownership. See note 2, *supra*. Furthermore, Dr. Fried, who was entitled to intervene (Pet. 7), chose not to participate in any manner even though he was fully aware of the pending action (Pet. App. A, 22-23).

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